**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**
No. 19-1696

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| **BUSINESS LEADERS IN CHRIST,**<br>*Plaintiff-Appellant*,<br>v.<br>**THE UNIVERSITY OF IOWA,** *et al.*,<br>*Defendants-Appellees*. | On Appeal from the United States District Court for the Southern District of Iowa<br><br>Case No. 17:cv-00080-SMR-SBJ |

**Unopposed Motion for Leave to File Brief of Proposed Amici Curiae Ratio Christi, Christian Medical & Dental Associations, 24:7, and Chi Alpha, in Support of Appellant and Urging Partial Reversal**

Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, Movants respectfully request leave to file as *amici curiae* the attached Brief in Support of Plaintiff-Appellant Business Leaders in Christ ("BLinC").

Appellant BLinC consents to the attached brief. Appellees do not consent, but also do not oppose this Motion.

In support of this Motion, and pursuant to Fed. R. App. P. 29(a)(3) and Eighth Circuit I.O.P.III.J.3, Movants state as follows:

## I. The Movants have significant interests in the outcome of this matter.

As described in the proposed Brief, the moving parties are religious organizations with chapters on the campus of the University of Iowa. Movants have a national and global presence with hundreds of chapters on campuses across the United States and the world. Like BLinC, these groups require their leaders to adopt their core beliefs. Any decision in this case will necessarily impact Movants' rights at Iowa and at other chapters in the country. Movants thus desire to state their position on this matter.

## II. Movants' brief is desirable and relevant to this case.

Without duplicating Appellant's arguments, the attached Brief will assist this Court in determining whether the University of Iowa's Human Rights Policy is facially invalid by showing how necessary it is for religious groups to be able to form around their beliefs. The Brief also explains how further factual development in the related InterVarsity Christian Fellowship case is relevant in showing that the individual-capacity Defendants-Appellees are not entitled to qualified immunity.

"An amicus brief should normally be allowed … when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997); *see United States v. Michigan*, 940 F.2d 143, 165-66 (6th Cir. 1991) (amicus offered information that was "timely, useful, or otherwise necessary to the administration of justice").

First, this case presents significant matters of First Amendment law. Movants' Counsel have substantial experience in First Amendment law. The proposed Brief explains the unique benefits that faith-based organizations provide on campus and how their faith-based requirements for leaders are fundamental to their identity and expression. Movants are thus uniquely situated to provide relevant arguments regarding the legal issues before this court and the practical impact a ruling may have on many organizations.

Second, the Brief also explains how individual-capacity Defendants-Appellees are not entitled to qualified immunity based on information from the InterVarsity litigation. That litigation has revealed that the University



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has selectively enforced its Human Rights Policy against certain religious groups, but that it has exempted other religious groups and hosts of other student organizations that also ostensibly violate the Policy. Movants and their counsel have extensive experience successfully challenging such policies that are employed in a discriminatory manner at other colleges. This information is highly relevant to show that the University and its officials engaged in blatant viewpoint discrimination against BLinC and that affirming the district court's qualified immunity ruling will lead to further abuse of students' First Amendment rights.

**Conclusion**

Movants respectfully request that this Court grant this motion, allow them to participate as *amici curiae*, and accept for filing the proposed *amici curiae* brief submitted with this motion.

Respectfully submitted,

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**Certificate of Compliance with Type-Volume Limitations**

This motion complies with Fed. R. App. Proc. 27(d)(1)(E) and 32(a)(5)(A) because it was prepared using 13-point Century Schoolbook, a proportionally spaced serif font which is slightly larger than 14-point Times New Roman.

This motion contains 574 words, which is less than the 5,200-word limitation imposed by Rule 27(d)(2)(A).

*/s/ Tyson C. Langhofer*
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**Certificate of Service**

I hereby certify that on June 10, 2019, I electronically filed the foregoing Unopposed Motion for Leave to File Motion for Leave to File Brief of Proposed Amici Curiae Ratio Christi, Christian Medical & Dental Associations, 24:7, and Chi Alpha, in Support of Appellant and Urging Partial Reversal with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

*/s/ Tyson C. Langhofer*
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**APPEAL NO. 19-1696**

**UNITED STATES COURT OF APPEALS**

**FOR THE EIGHTH CIRCUIT**

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Business Leaders in Christ,

*Plaintiff-Appellant*

v.

University of Iowa, et al.,

*Defendants-Appellees*

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Appeal from the United States District Court
for the Southern District of Iowa—Davenport
The Honorable Stephanie M. Rose
Case No. 3:17-CV-00080-SMR-SBJ

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# Brief of Religious Student Organizations as *Amici Curiae* in Support of Business Leaders in Christ and Urging Partial Reversal

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to FED. R. APP. P. 29(a)(4)(A) and 26.1, *Amici Curiae* submit the following corporate disclosure statements:

Ratio Christi, Inc. is a non-profit organization. It has no parent corporation and no publicly held company holds 10% of its stock.

Christian Medical & Dental Associations is a non-profit organization. It has no parent corporation and no publicly held company holds 10% of its stock.

Parkview Evangelical Free Church is a non-profit organization. It has no parent corporation and no publicly held company holds 10% of its stock.

Chi Alpha Campus Ministries, U.S.A. is a non-profit organization. It has no parent corporation and no publicly held company holds 10% of its stock.

Respectfully submitted,

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## STATEMENT OF INTEREST[1]

*Amici* are religious ministries with active chapters at the University of Iowa. Because *Amici* maintain belief and conduct-based standards for their leaders, the registered status of their Iowa chapters are "pending" based on the outcome of this litigation. Like Appellant, *Amici*'s Iowa chapters welcome everyone to their meetings, activities, and events, but they could not accomplish their respective missions without ensuring that their leaders embody their core religious beliefs.

Ratio Christi explores and debates some of the most probing questions about faith, reason, and life through panel discussions, lectures, discussion groups, and debates. At more than 170 chapters across the country and the world, Ratio Christi trains students to discuss their beliefs in a rational manner, hosts events, and fosters dialogue on campus. Indeed, at many of its chapters, more non-Christians than Christians attend its events. Ratio Christi also provides community for its regular members by connecting them to one another and by hosting informal fellowship events.

Christian Medical & Dental Associations strives to motivate, educate, and equip Christian healthcare professionals to glorify God by serving all peoples with professional excellence as witnesses of Christ's love and compassion and by advancing biblical principles of healthcare within the Church and our culture. CMDA has 207 chapters at universities across the

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[1] *Amici* have submitted an unopposed motion to file this brief. FED. R. APP. P. 29(a)(2)-(3). No counsel for any party authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. And no person—other than the *Amici Curiae*, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief.



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country.

Parkview Church operates a non-profit ministry called 24:7. Through 24:7, Parkview seeks to advance the Gospel of Jesus Christ and His Kingdom by sharing the love of Christ with other students at the University of Iowa. 24:7 creates a supportive community for students and offers unique community service opportunities both locally and internationally.

Chi Alpha Campus Ministries is the college outreach ministry of the General Council of the Assemblies of God. It strives to reconcile students to Christ, equipping them through Spirit-filled communities of prayer, worship, fellowship, discipleship, and missions. At 320 university chapters across the country, Chi Alpha provides community groups, fosters creativity and diversity, promotes excellence, integrity, and student leadership, and serves the community through service and outreach.



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## INTRODUCTION AND SUMMARY OF THE ARGUMENT

The district court correctly held that the University does not apply its Human Rights Policy in a viewpoint-neutral manner because it specifically targets certain religious groups while not applying the Policy to other groups that ostensibly violate the Policy. The district court also correctly held that Business Leaders in Christ, known as BLinC, is entitled to nominal damages and a permanent injunction.

But the district court erred by granting qualified immunity to individual-capacity Defendants-Appellees despite overwhelming evidence that the University is specifically targeting religious viewpoints. This ruling harms First Amendment rights because it will embolden university officials to take one free shot against aggrieved students. The University of Iowa's interpretation of its Policy also irrationally denies a religious student group the ability to select leaders who embody the group's core beliefs. It thus deprives many students of a rich and vibrant part of campus life.

The University of Iowa deregistered BLinC, a Christian student group, because it required its leaders to affirm specific Christian beliefs. The University claims that it did so because of its Human Rights Policy, which prohibits differential treatment of persons on a variety of characteristics, including religion and sexual orientation. JA Vol. X at 2631; see also JA Vol. IX at 2377 ¶ 9.

First, the University's interpretation of its Policy is irrational. The University is using a policy that prohibits religious discrimination to discriminate based on religion. This threatens the very existence of religious student groups and suffocates the marketplace of ideas.

Leadership determines policy and expression. Nowhere is this truer than in a religious organization, "whose very existence is dedicated to the collective expression and propagation of shared religious ideals." *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 565 U.S. 171, 200 (2012) (Alito, J., joined by Kagan, J., concurring). Any organization dedicated to advancing a particular cause must ensure that those who lead it are actually committed to that cause. For religious student groups, their faith is the basis of their mission and forms their institutional identity. While religious student groups, like *Amici*, invite everyone to their meetings and activities, they require leaders, "the very embodiment of [the organization's] message," to embrace their organization's basic religious convictions. *Id.* at 201 (internal quotations omitted). Anything less threatens the effectiveness and existence of these groups, who have served and enriched the campus community at the University of Iowa for years.

Second, qualified immunity does not apply to the University officials who blatantly discriminated against BLinC because of its religious viewpoint. Qualified immunity does not protect individual-capacity defendants who violate constitutional rights that are clearly established at the time of the violation. *Gerlich v. Leath*, 861 F.3d 697, 704 (8th Cir. 2017).

Here, it is well-established that a university cannot engage in viewpoint discrimination against student groups. *E.g.*, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). This is especially true for religious student groups. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537-38 (1993) (striking law under free exercise clause



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because it granted secular, but not religious, exemptions).

Until 2017, the University never applied the Policy against religious groups. In fact, it repeatedly defended religious groups from the very same discrimination in which it now engages. But the University has since enforced its Policy against religious organizations—while exempting other groups—and thus denied them the ability to select leaders who embody and support the organizations' core religious beliefs.

Prompted by the BLinC controversy, the University reviewed other student organizations. In 2018, it deregistered Sikh, Muslim, Latter-day Saints, and minority Protestant groups, including InterVarsity Christian Fellowship/USA. The University has and still does exempt its own programs and scholarships, its fraternities and sororities, and student groups formed on race, sex, sexual orientation, and veteran status. The University even exempts Love Works, a Christian group that requires its leaders to affirm beliefs *opposite* that of BLinC's. JA Vol. X at 2456-57 ¶ 17.

This is open religious viewpoint discrimination. Thus, to show that qualified immunity applies, the University must show that it came close to satisfying strict scrutiny. But even now, the University has no evidence showing how those religious groups harm the University's interests, and thus no plausible—much less reasonable—argument for why its targeted enforcement comes close to satisfying strict scrutiny.

In *Amici*'s experience, numerous universities change their policies before being sued or settle early in litigation to avoid accountability such blatant viewpoint discrimination. But if this Court does not reverse on

qualified immunity, university officials elsewhere will be able to invent new ways to discriminate against students without being held accountable.

Accordingly, qualified immunity does not and should not apply.

## ARGUMENT

### I. The University's interpretation of its Human Rights Policy is irrational and destroys a vibrant and diverse religious life.

The University argues that its Policy allows it to bar religious groups from selecting leaders who shares the organization's core religious beliefs. This irrational interpretation denies religious organizations the right to select leaders who embody their beliefs, and thus the right to exist on campus. This robs colleges and their students of a vibrant, diverse collegiate atmosphere.

#### A. Religious student organizations must be allowed to organize around shared religious views and seek leaders who embody their religious commitments.

College campuses should be a "marketplace of ideas." *Healy v. James*, 408 U.S. 169, 180 (1972) (internal quotation omitted). That is, colleges should promote diversity of thoughts and opinions from persons "whose ideologies and viewpoints, including religious ones, are broad and diverse." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995); *see Healy*, 408 U.S. at 180 ("[T]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.") (internal quotations omitted). Critical to that marketplace is allowing students to join together to advocate for a common cause. This is especially true for college campuses like the University of Iowa that number tens of thousands of students.



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As the district court recognized, "restrictions on [a student group's] leadership criteria" implicate free speech and expressive association; "*who* speaks on the group's behalf colors *what* concept is conveyed." Add. 048 (quoting *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 680 (2010)) (markings omitted); *accord, e.g.*, *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655-56 (2000) (the First Amendment protects the leadership decisions of the Boy Scouts of America because leaders' beliefs and actions change the message of the expressive association).

Decisions regarding who leads and speaks for an association are fundamental to the association's ability to exist as a distinctive entity. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 581 (1995) (the First Amendment prohibits the state from forcing an expressive association to include speakers that alter the association's message). This is because groups express and embody their views through their leaders. Forcing a group to offer leadership roles to those who do not share its core beliefs distorts or destroys that voice. *Dale*, 530 U.S. at 654. And for religious groups, "[d]etermining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is … a means by which a religious community defines itself." *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., joined by Marshall, J., concurring); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 201 (2012) (Alito, J., joined by Kagan, J., concurring) ("A religious body's control over [those who lead it] is an essential component of its freedom to speak in its own voice, both to its

own members and to the outside world.”).

Whether the association is for secular or sacred purposes, the government has no right to insist that the Iowa UDems, Hawks for Choice, BLinC, *Amici*, or any other group allow students who are critical of the group's views to lead its discussion groups, speak publicly in its name, or select its speakers and policies. JA Vol. X at 2458-59 ¶ 19. If the right of association means anything, it “presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only.” *Democratic Party of U.S. v. Wisconsin*, 450 U.S. 107, 122 (1981). After all, “[i]f the government were free to restrict individuals' ability to join together and speak, it could essentially silence views that the First Amendment is intended to protect.” *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 68 (2006).

This freedom is essential for students, like those in *Amici*'s organizations, whose views are in the minority. The freedom of expressive association is “especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.” *Dale*, 530 U.S. at 648 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984)). Large and broadly accepted groups can generally defend their identity through sheer force of numbers. But smaller or less popular groups are far more vulnerable to takeover or harassment. In an earlier era, public universities frequently attempted to bar gay rights groups because those groups supposedly encouraged what was then-illegal behavior. The courts made short shrift of those policies. *See, e.g.*, *Gay & Lesbian Student*



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*Ass'n v. Gohn*, 850 F.2d 361, 366-68 (8th Cir. 1988). The question here is whether groups like BLinC, *Amici*, and others will receive comparable protection.

*Amici* welcome everyone to their meetings and events. *Amici* do not allow or engage in invidious discrimination—the exclusion of individuals based on irrelevant characteristics—in their leadership decisions. But if persons who do not share *Amici's* core beliefs can insist on leading one of *Amici's* weekly Bible studies, those meetings would cease to be an expression of *Amici*'s beliefs. Those persons would not embody or express the group's core beliefs, and each "group as it currently identifies itself [would] cease to exist." *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 863 (7th Cir. 2006). A religious group's faith requirements are a "legitimate self-definitional goal." *Hsu By & Through Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 860-61, n.20 (2d Cir. 1996). "[J]ust as a secular club may protect its character by restricting eligibility for leadership to those who show themselves committed to the cause," BLinC and *Amici* "may protect their ability to hold [distinctive mission-based] meetings by including the leadership provision in [their] constitution." *Id.* at 861.

"By imposing an unwanted [leader], the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments." *Id.* The organization of a student group around shared beliefs is not unique to those that are religious. Any student group advocating for particular beliefs or views requires leaders who share those beliefs. Otherwise, the group's expression will



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fundamentally change. A Democratic club with a Donald Trump supporter as its President, a vegan club led by a hunter, or a CrossFit club led by a couch potato will all have their expression altered by this new leadership—both internally in their messaging and externally in the perception of those the group seeks to influence.

This applies with even more force for a religious group, whose leaders must both express *and believe* their message. "For this reason, a religious body's right to self-governance must include the ability to select, and to be selective about, those who will serve as the very 'embodiment of its message' and 'its voice to the faithful.'" *Hosanna-Tabor*, 565 U.S. at 201 (Alito, J. and Kagan, J. concurring) (citation omitted). When it comes to selecting leaders for religious groups, "depriving the [ministry] of control over the selection of those who will personify its beliefs" is forbidden by the First Amendment. *Hosanna-Tabor*, 565 U.S. at 188. And practically speaking, belief statements and codes of conduct protect against the ideological drift that time, inattention, and majoritarianism inevitably bring. *See* Rod Dreher, *A Response From Vandy's Misfit Christian*, The American Conservative (Aug. 27, 2014), https://bit.ly/2XBM7ut.

The law commonly grasps this point. *See Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 338 (1987) (religious organizations' Title VII exemption from religious nondiscrimination law permissibly lifts a regulation that "burdens the exercise of religion"). The right of religious association includes the "right to organize voluntary religious associations," *Watson v. Jones*, 80 U.S. 679, 728 (1871), to choose the leaders of those associations, *Serbian E.*



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*Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976), and to require "conformity of the members of the [association] to the standard of morals required of them." *Watson*, 80 U.S. at 733; *see also Hosanna-Tabor*, 565 U.S. 171, 201 (Alito, J. and Kagan, J. concurring) ("A religion cannot depend on someone to be an effective advocate for its religious vision if that person's conduct fails to live up to the religious precepts that he or she espouses."). The University of Iowa's new interpretation of its Human Rights Policy infringes on precisely these constitutional rights.

### B. Religious student groups enrich the University community.

Religious student organizations serve students at the University of Iowa in numerous ways. They connect students to both local and global service opportunities, provide spiritual guidance, emotional support, and a sense of belonging to otherwise-isolated students. Even the University's Dean has stated that religious groups allow students to "espouse a particular ideology or belief or a mission" and that this is "beneficial" because "it promotes progress toward graduation [and] it gives students a sense of camaraderie." JA Vol. X at 2548 ¶ 355.

Ratio Christi sparks discussion on and provides a community for students interested in an intellectual defense of Christianity. In the spring of 2016, Ratio Christi's Iowa chapter hosted a lecture on the rational defense of Jesus' resurrection. The lecture drew about 600 people from both religious and nonreligious backgrounds. In March of 2018, they hosted another event discussing God as revealed in the Old Testament. That event drew over 100 people and resulted in a weekly apologetics series that drew a dozen regular



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attendees. And at the most recent Ratio Christi Christmas party, most of the students decided to watch a philosophical discussion about the meaning of life instead of engaging in the scheduled board games.

The ministry 24:7, as its name implies, seeks to provide constant support for students by connecting them with each other and with a larger spiritual community, by mentoring students and by helping them learn how to thrive while facing the changing demands of college life.

Similarly, Chi Alpha's Iowa chapter participates in the organization's feedONE initiative, which provides nutrition, clean drinking water, and educational resources to more than 146,000 children in 11 countries around the world.[2] Chi Alpha also provides ethnic-specific events for underserved students, promotes international missions, and connects students to hundreds of worldwide service and ministry opportunities.[3]

The CMDA hosts an annual community health fair, hosts blood drives, and provides free blood pressure checks. Its members visit the local children's hospital at Christmas to encourage and support patients and families. CMDA also takes students on international medical mission trips, giving them practical experience in putting their faith commitments into practice.

InterVarsity's University of Iowa chapter has served the University community for over twenty-five years. IVCF Reply SoF ¶ 4.[4] In addition to

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[2] *feedONE*, Chi Alpha, https://bit.ly/2wK2B8d (last visited June 10, 2019).

[3] *Diversity*, Chi Alpha, https://bit.ly/2F3ox2v; *XA Expeditions*, Chi Alpha, https://bit.ly/2MCEjaU; *Opportunities*, Chi Alpha, https://bit.ly/2WsjSNq (all last visited June 10, 2019).

[4] IVCF cites refer to docket entries 40-1 (IVCF Reply Statement of Facts), 53 (IVCF Supplemental Statement of Facts), and 54 (Defs.' MSJ Br.)



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hosting weekly Bible studies and monthly religious services, InterVarsity has conducted numerous service projects, educational events, interfaith activities, and other campus-wide events. *Id.* In fact, the University previously recognized and awarded InterVarsity for its efforts in serving the entire University community. *Id.*

Combined, these organizations provide countless hours of service, enhance the spiritual and emotional wellbeing of students, and add to the rich cultural diversity of the campus community. Religious groups are vibrant threads in the tapestry of campus life at the University of Iowa. To stifle these organizations and the students they represent would be a great loss to the campus community. Yet that is the natural consequence of the University's irrational interpretation of its Policy.

## II. The district court should not have granted qualified immunity because the University violated BLinC's clearly established constitutional rights.

For decades, the University ardently defended religious student organizations' ability to select their leaders based on religious beliefs. The University changed course when a student complained that BLinC promoted traditional Christian views on sexuality, gender identity, and marriage. But the University did *not* change course as to the multitude of student organizations and University programs that discriminate based on race, gender, veteran status, gender identity, and sexual orientation. The University even registered Love Works, which requires its leaders to share its

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in the related and ongoing InterVarsity case. *InterVarsity Christian Fellowship/USA v. Univ. of Iowa*, Case No. 3:18-cv-00080 (S.D. Iowa, Eastern Division).



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beliefs on sexuality that are *opposite* to BLinC's. JA Vol. X at 2456-57 ¶ 17, 2528 ¶¶ 262-66. The University cannot justify this blatant viewpoint discrimination against religious beliefs.

Qualified immunity does not protect individual-capacity defendants who violate constitutional rights that were clearly established at the time of the violation. *Gerlich v. Leath*, 861 F.3d 697, 704 (8th Cir. 2017); *see also Sundquist v. Nebraska*, 122 F. Supp. 3d 876 (D. Neb. 2015) ("the Eighth Circuit subscribes to a 'broad view' of what constitutes clearly established law," and holding that law was clearly established even though "there is no case directly on point"), *aff'd* 692 F. App'x 800 (8th Cir. 2017).

As the district court held, a state university that grants official recognition to student-led organizations has created a limited public forum. Add. 049; *accord, e.g.*, *Gerlich*, 861 F.3d at 704-05. While "some content- and speaker-based restrictions may be allowed" in the forum, *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017), universities may not "discriminate against speech on the basis of its viewpoint," which is an "egregious form" of the already-disfavored content discrimination. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (citation omitted).

This is especially true for a free exercise claim, which is not subject to the limited-public-forum analysis. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537-38 (1993) (striking law that granted secular, but not religious exemptions and noting that religious practice was "being singled out for discriminatory treatment"); *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018) ("The Free



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Exercise Clause bars even 'subtle departures from neutrality' on matters of religion.") (quoting *Lukumi*, 508 U.S. at 534).

The district court held that qualified immunity protects the named University officials because the law "left unresolved how a selective application of the policies in question would impact the respective plaintiffs' constitutional rights." Add. 069-070. But of course, well-established caselaw make clear that *any* viewpoint discrimination is prohibited. *Rosenberger*, 515 U.S. at 829.

*Amici* show how the University repeatedly protected religious groups from exactly the same kind of discrimination in which it now engages. Further factual development in the related InterVarsity case also reinforces the University's targeted discrimination. *Amici* have substantial experience challenging and winning against similar interpretations of nondiscrimination policies and add that the University's recalcitrance here is especially egregious. Qualified immunity does not apply.

### A. The University historically protected religious groups from the exact same viewpoint discrimination it now defends.

*Amici* have long maintained chapters on the University of Iowa campus, some for decades. During that time, the University consistently recognized that its Human Rights Policy entitled student organizations to select leaders based on their beliefs and personal conduct.

In the past twenty years, the University has repeatedly defended the right for religious student groups to enact faith standards for their leaders. Aplt. Br. 13-16; *see* JA Vol. X at 2468-70 ¶¶ 36-44 (detailing 1999 approval of

Christian Legal Society's belief-based membership requirements). And at least twice, the University has been asked to apply the same Human Rights Policy to derecognize, defund, or otherwise punish a religious student group because of their faith standards for leaders. Recognizing that to do so would be wrong, the University expressly refused both times. R. 1-13, 2004 University Letter to CLS; *see* R. 86-1, Mar. 23, 2017 24:7 Letter.

In one instance from 2003, the Student Government denied the Christian Legal Society's ("CLS") application to register as a student group because their constitution did not conform to the University's Policy. The Associate Dean of Students (and Defendant here) Thomas R. Baker reassured the Christian Legal Society ("CLS"):

> Implicit in the Human Rights Policy is the distinction between class characteristics such as race and gender, on one hand, and on the other hand the personal conduct of those who seek to join student organizations. *The [student group] would not be required, and will not be required, to condone the behavior of student members … that is contrary to the purpose of [its] organization and its statement of faith.*

R. 1-13 at 3 (emphasis added).[5] The University promised that requiring members to sign a statement of faith "*would not violate the UI Human Rights Policy*." *Id.* (emphasis in original). The University even admonished the Student Government that it was "oblig[ed] under the law and University policy to realize the group members' freedom to promote their beliefs through association." JA Vol. X at 2475-76 ¶¶ 63-67. In similar incidents in 2008 and 2009, the University also *twice* warned *students* that they could be personally

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[5] Of course, this historic interpretation also fails to account for the numerous student organizations and University programs that discriminate based on "class characteristics" such as race and gender. *See, e.g.*, JA Vol. X at 2457-58 ¶ 18, 2460 ¶¶ 24-25, 2462-68 ¶¶ 28-35.

liable if they denied groups benefits because of their religious views. JA Vol. X at 2477 ¶ 72, 2479 ¶ 80.

CLS also requested a formal exemption from the Policy. But the University responded: "Since the Human Rights Policy protects groups such as [CLS] from discrimination on the basis of creed, it is not necessary to formally exempt religious groups from the Human Rights Policy in order to ensure that the rights of CLS members are protected." R. 1-13 at 3. In other words, the University already knew how to enforce the Policy without violating constitutional protections.

### B. The University's treatment of religious groups shows that it consistently discriminated against religious viewpoints.

Without materially altering the Policy, the University has targeted the very groups that it previously recognized it had to protect. In the summer of 2018, the University reviewed the constitutions of many other student organizations. As a result, the University deregistered many other religious groups, including a Muslim group, a Sikh group, the Latter-day Saint Student Association, and InterVarsity and several other Christian groups, because those organizations required their leaders to affirm the organization's beliefs. IVCF Reply SoF ¶¶ 13-14.

The University says that it was simply enforcing the plain text of the Policy against BLinC and the other religious organizations, but this cannot be true. The Policy's language never changed except for a recent Title IX exception, JA Vol. X at 2454 ¶¶ 11-13, but the University has exempted from the same Policy every one of dozens of student organizations that limit or encourage leadership based on race, sex, veteran status, beliefs, gender



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identity, and sexual orientation. The University even exempted another Christian organization, Love Works, that requires its leaders to affirm religious views directly contrary to BLinC's. JA Vol. X at 2456-60 ¶¶ 17-19, 23-35. The University's actions against BLinC were thus part of a pattern of targeted religious discrimination. Qualified immunity does not apply.

To show that qualified immunity applies, the University must show that its viewpoint discrimination came close to satisfying strict scrutiny. *See* Add. 59-61, MSJ Order (holding that University did not satisfy strict scrutiny). But it cannot.

As an initial matter, the University's selective application of its Policy "leaves appreciable damage to [its] supposedly vital interest[s] unprohibited," so the ban on religious leadership selection "cannot be regarded as protecting an 'interest of the highest order.'" *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (citation omitted). But even still, the University never even attempted to protect sensitive First Amendment interests that it knew were implicated by its Policy.

First, the University failed to show a compelling interest in controlling religious groups' leadership because it points to no "actual problem" in need of solving. *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 799 (2011) (internal quotations omitted). For example, the University produced not a single piece of evidence showing that anyone had ever complained about InterVarsity's choice to select leaders embracing its faith in the 26 years it has been on campus. IVCF Reply SoF ¶¶ 5, 9; IVCF Suppl. SoF ¶¶ 298-99. Indeed, the University actually awarded InterVarsity for its service to the



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student body. IVCF Reply SoF ¶¶ 4. And the University has no evidence showing that it ever attempted to gather, discuss, or otherwise identify any specific evidence that a religious group's belief requirements for its leaders would cause any harm. IVCF Suppl. SoF ¶¶ 359-62.

The University also undermines its supposed interest in enforcing the Policy because it has failed to show that denying fraternities and sororities an accommodation would harm its interests. *Id.* ¶¶ 312-13, 369-78. Nor does it seem to care. The University has no mechanisms to monitor whether the prohibition on InterVarsity's leadership selection or the allowance of Greek groups' membership exclusions either help or harm its interests. *Id.*

And this is to say nothing of the exemptions that the University gives to student organizations formed based on race, veteran status, ideology, gender identity, or sexual orientation, including Love Works. IVCF Reply SoF ¶¶ 208-18; *see also* JA Vol. X at 2456-57 ¶ 17, 2459-61 ¶¶ 23-25, 2462 ¶¶ 27-28.

To be sure, the University argued at summary judgment that such groups provide "safe spaces for minorities" while groups like BLinC and InterVarsity do not. JA Vol. IX at 2424. But this just begs the question. The University determines what spaces are "safe" and "unsafe" based on an organization's views and beliefs—in BLinC's case, its religious beliefs.

The Policy also extends beyond student groups and applies to all of the University's programs, but the University makes no attempt to harmonize the Policy with its numerous initiatives and scholarships based on race, sex, veteran status, and sexual orientation. JA Vol. X at 2463-68 ¶¶ 29-35. This



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lack of concern is fatal to its attempt to satisfy strict scrutiny. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 821 (2000) (government's failure to conduct "some sort of field survey" made it "impossible to know" if the regulation served its alleged interest, meaning it flunked strict scrutiny). With no proposed rationale for its selective enforcement—much less one that it supports with factual findings or data—the University cannot show that it has a compelling interest justifying its viewpoint discrimination.

And in fact, many universities recognize this. That is why, in *Amici* Ratio Christi's and Chi Alpha's experience, nearly every other university attempting to enforce a similar policy in a similar manner changes that policy without an *Amicus* having to sue. *See* Sec. III, *infra*. And even the rare cases that do go to litigation have not gone beyond responsive pleadings before the university changes its policy and settles. *Id.*

The University also fails strict scrutiny because it has not used the least restrictive means to enforce its Policy. As a general rule, the government must show that "it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." *Native Am. Council of Tribes v. Weber*, 750 F.3d 742, 751-52 (8th Cir. 2014) (internal quotations omitted). Even though the University accommodated secular student groups and Love Works, the University never even considered alternatives for disfavored religious groups.

For example, the University knew that Iowa State University and other universities had clear-cut policies that would accommodate religious leadership selection. IVCF Suppl. SoF ¶¶ 304-07, 377-78. The University did



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not study those policies or even explain why it could not adopt similar policies. *Id.* ¶¶ 377-78 But the University reviewed no evidence showing that those policies were ineffective at other institutions or would be impractical at the University. *Id.* ¶¶ 304-07. Further, there was no effort to study whether there could be some middle road between registration and complete deregistration. *Id.* ¶¶ 308-11, 359-65. Such "meager efforts to explain" why "the plans adopted by those other institutions would not work" here do not present even a colorable case that the University employed the least restrictive means. *Rich v. Sec'y, Fla. Dep't of Corr.*, 716 F.3d 525, 534 (11th Cir. 2013).

This lack of concern is especially glaring because the University has repeatedly accommodated other student groups. For instance, the University gave only passing consideration to InterVarsity's suggestion about "strongly encourag[ing]" its leaders to agree with its faith. IVCF Suppl. SoF ¶¶ 274-76 But the University allowed Women in Science and Engineering to "encourage[]" its members to be "a woman." *Id.* ¶¶ 273-76, 363. Similarly, the University permitted the acapella group Hawkapellas to restrict its leading roles to women, but failed to consider whether some form of leadership selectivity might be sufficient for religious groups. *Id.* ¶ 273.

Of course, these alternatives may have suffered from their own infirmities. But the University never even considered these options, so it cannot survive strict scrutiny. *281 Care Comm. v. Arneson*, 766 F.3d 774, 787 (8th Cir. 2014) (passing least restrictive means test requires proving that policy "is necessary," is "not underinclusive," and "could be replaced by no



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other regulation"). Such indiscretion does not survive even intermediate scrutiny. *NIFLA v. Becerra*, 138 S. Ct. 2361, 2376 (2018) (government flunked narrow-tailoring requirement where it had "identified no evidence" to "prove" tailoring).

The University's lack of concern about the effects of its Policy and its inability to get beyond broadly formulated considerations show that it not only violated BLinC's rights, but also knew that it was doing so. The University's historic defense of religious groups and its discriminatory treatment of other religious groups further demonstrates that BLinC was targeted for viewpoint discrimination, not because the University wanted to enforce its Policy evenhandedly. Qualified immunity does not protect such blatant viewpoint discrimination.

### III. The district court's qualified immunity ruling will encourage protracted litigation and thus deter aggrieved students.

*Amici* have expended substantial time and effort defending against other universities that attempt to enforce policies similar to the University of Iowa's Policy in a manner similar to Iowa. While universities regularly back down before litigation or early in litigation, this has come at significant cost to *Amici* and their students, staff, and counsel. If this Court does not reverse on qualified immunity, many religious groups will be unable to endure protracted litigation against university officials emboldened by an exceedingly broad reading of qualified immunity and the attendant reputational harm from it.

For example, *Amicus* Ratio Christi has had 18 universities take action against its chapters because of its belief requirements for leaders. After

arduous and lengthy negotiations, all 18 chapters have obtained express or *de facto* exemptions from the policies. In the vast majority of these controversies, the university changed its policy prior to litigation. And even when litigation began, it did not proceed past responsive pleadings. Most recently, the University of Colorado, Colorado Springs (UCCS) denied Ratio Christi registered status. *Ratio Christi at the Univ. of Colo., Colo. Springs v. Sue Sharki*, Civ. No. 18-cv-02928 (D. Colo. 2019). Ratio Christi sued. After 170 attorney hours and many hours from Ratio Christi staff and students—but before UCCS even filed its answer—UCCS agreed to modify its policy. UCCS granted Ratio Christi registered status, paid $20,500 in damages and attorneys' fees, and revised its policies so that other groups like Ratio Christi would not be deregistered for selecting based on beliefs. *Lawsuit prompts Colorado university to change policy, protect students' freedoms*, Alliance Defending Freedom (May 14, 2019), https://bit.ly/2X09AZc
10762 (link to settlement agreement on right hand side).

Similarly, Chi Alpha has engaged in lengthy negotiations with numerous universities throughout the country, including Missouri, Indiana, Colorado, California, New York, and Washington. Chi Alpha has normally been able to obtain accommodations for its religious leadership requirements. But even in these instances, Chi Alpha students have had to spend hours and hours of time which should have been available for ministry or schoolwork just to obtain equal access on campus. They have also been subject to personal attacks, even from government officials, accusing them of invidious discrimination. Chi Alpha's legal counsel alone has expended over 1,000

hours in the past five years addressing such situations.

If other universities follow Iowa's cue, religious student groups will suffocate or will remove themselves from campus to avoid the heavy cost and reduced benefit of litigation. For example, the InterVarsity chapter at Iowa has experienced great difficulty recruiting new leadership; it has reduced its event schedule because it is preoccupied financially and logistically with litigation; and it has seen its largest ebb in attendance in 22 years. IVCF Suppl. SoF ¶¶ 225, 228, 230, 243. And this is only natural, since the students there are rightly afraid that litigation would detract from the ministry, that the University may discipline them for being in the ministry, and that they may suffer lasting reputational harm because of the University's invective and aspersions. *Id.* ¶ 232 (stating that InterVarsity was defunct "due to lack of interest"); IVCF Defs.' MSJ Br. 9, 16, 23 (stating that InterVarsity is "seeking special dispensation" to violate "state and federal civil rights laws" and to "discriminate against [its] peers").

*Amici*'s counsel can devote only so many resources to these student groups, and the groups themselves come under intense public scrutiny. And as *Amicus* FIRE notes, protracted litigation without the prospect of damages in the university setting makes relief even less likely. (FIRE *Amicus* Br. 19-20.) If university officials can hide behind qualified immunity for blatant viewpoint discrimination, *Amici*—to say nothing of smaller religious groups—will likely self-censor rather than face a long lawsuit with dubious prospects. Thus, applying qualified immunity to the University's blatant viewpoint discrimination here is not only legally wrong, it is bad public policy.

## CONCLUSION

Diversity, and the value it provides, exists only when differences can co-exist. The University may think that its actions against religious groups are "forward thinking." But a prescribed government orthodoxy, especially one that targets only religious groups, is abhorrent to the First Amendment. As Justice Kennedy wrote in one of his last opinions,

> [I]t is not forward thinking to force individuals to be an instrument for fostering public adherence to an ideological point of view they find unacceptable. It is forward thinking to begin by reading the First Amendment as ratified in 1791; to understand the history of authoritarian government as the Founders then knew it; to confirm that history since then shows how relentless authoritarian regimes are in their attempts to stifle free speech; and to carry those lessons onward as we seek to preserve and teach the necessity of freedom of speech for the generations to come. Governments must not be allowed to force persons to express a message contrary to their deepest convictions. Freedom of speech secures freedom of thought and belief. This law imperils those liberties.

*NIFLA v. Becerra*, 138 S. Ct. 2361, 2379 (2018) (Kennedy, J. concurring) (citations, quotations, and alterations omitted).

For these reasons, this Court should reverse the district court's holding that qualified immunity shields the named University officials from damages.



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## CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

This brief complies with FED. R. APP. P. 32(a)(5)(A) because it was prepared using 13-point Century School Book, a proportionally spaced serif font which is slightly larger than 14-point Times New Roman.

Excluding parts of the brief in FED. R. APP. P. 32(f), this brief contains 6,369 words, which is less than the 6,500 word limitation imposed by FED. R. APP. P. 29(a)(5) and 32(a)(7)(B)(i).

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## CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2019, I electronically filed the foregoing Brief of *Amici Curiae* with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

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## CERTIFICATE OF DIGITAL SUBMISSION

Pursuant to Eighth Circuit Local Rule 28A(h)(2), I certify that on June 10, 2019, the digital submission has been scanned for viruses using Kaspersky VirusDesk and that, according to the program, the brief is virus-free.

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